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Supreme Court of the United States

October Term 1975

NO. 76-12

BOBBY JOE UPTON,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

The State of Georgia strongly opposes the Petition for Writ of Certiorari in the above-stated case and respectfully files this Brief in Opposition, pursuant to Revised Rule 24 of this Honorable Court.

JURISDICTION

The jurisdiction of this Court to consider this Petition for Certiorari, pursuant to 28 U.S.C. 1257(3), is conceded by Respondent. However, Respondent contends that Petitioner lacks legal standing to attack the

constitutionality of the Georgia wiretap statute, under the facts of this case.

QUESTIONS PRESENTED FOR REVIEW

Although the question presented for review as posed by Petitioner is technically accurate so far as it goes, it does not place in proper perspective for this Court's consideration all of the pertinent legal and factual elements which are essential to a complete understanding of the actual issue. Therefore, we will restate Petitioner's Question, as two questions, as follows:

I.

Whether the fact that the Georgia court-authorized wiretapping statute (*Ga. Code Ann.* § 26-3004), which was enacted prior to the enactment of its Federal counterpart (18 U.S.C. 2510-2520), does not contain some of the requirements of the aforesaid Federal statute, requires a ruling that the Georgia statute is unconstitutional where:

(a) the Supreme Court of Georgia has consistently held that the provisions of the Federal wiretap statute are controlling and that the Georgia wiretap statute is supplementary thereto; and

(b) in the instant case, all of the requirements of the Federal statute were substantially complied with notwithstanding the absence of some of those requirements in the Georgia statute.

II.

Under the foregoing circumstances, whether the Petitioner has legal standing to challenge the constitu-

tionality of aforesaid Georgia statute because of its lack of conformity in some respects with the Federal statute where he can show no violation of any requirement of the Federal statute as applied to him.

STATEMENT OF THE CASE

(a) Inaccuracy in Petitioner's Statement.

Petitioner's statement is essentially accurate, with the exception of the sentence, "All alleged gambling communication being intercepted therefrom originated in her (Petitioner's mother-in-law who resided next door to Petitioner) residence and without Petitioner's knowledge" (Petition, p. 8. Explanatory words inserted). This is a pure conclusion on the part of Petitioner and is not supported by the evidence.

Both telephones in the mother-in-law's house were listed in Petitioner's name and at his residence, not at hers (Tr. 225-227). An extension line unauthorized by the telephone company had been run between telephone number 461-1927 in Petitioner's home to a telephone in the mother-in-law's residence next door (Tr. 148-149; 225-227). The wiretap was connected *to Petitioner's telephones* (Tr. 148-149); more than one thousand lottery bets were transmitted to the mother-in-law over the latter telephone in two days' time (Tr. 150-151; Tr. 192). It is therefore quite apparent that the intercepted gambling conversations could have originated in either Petitioner's residence or the next door residence, since his telephone and the extension were both operative (Tr. 215-216, 220). Petitioner's knowledge of the illegal gambling use of his telephone can be inferred from his providing his mother-in-law a "cover" from which to operate her two to three million

dollar per year lottery (Tr. 192). In any event, the sufficiency of the evidence against Petitioner has been decided adversely to him by the Georgia Supreme Court. It is not a Federal question and is not an issue in this Petition.

(b) **Other Factual Statements in Other Portions of Petition are not Fairly Comprised Within the Question Presented by Petitioner.**

Petitioner's "Question Presented for Review" (Petition, p. 2) is an attack upon the constitutionality of the Georgia wiretap statute and nothing more. Nevertheless, in his section devoted to argument he alleges facts which have no relationship whatever to that question and are not fairly comprised therein. These irrelevant contentions are that the facts in the probable cause affidavit upon which the interception order was issued are untrue (Petition, p. 13); contain no probable cause as to Petitioner (Petition, p. 15); do not contain a complete history of prior electronic surveillance of persons named therein (Petition, p. 13); and does not contain a complete statement that other investigative procedures have been tried and failed (Petition, p. 13). These issues have been ruled upon adversely to Petitioner by the Supreme Court of Georgia (see opinion of the Court, pps. 48-52, Petition), and Respondent will not encumber this brief by arguing them further, since these issues are completely separate and unrelated to the constitutionality of Georgia statute under attack by Petitioner, which is the sole question raised before this Court by Petitioner.

ARGUMENT IN OPPOSITION TO GRANTING THE WRIT

I. GEORGIA COURTS HOLD THAT TITLE III IS THE CONTROLLING WIRETAP STATUTE; TITLE III WAS COMPLIED WITH IN THIS CASE.

(a) **The Georgia Wiretap Statute, being Enacted Earlier, does not conform in all Respects to the Federal Statute; However, It is not Repugnant to the Federal Statute in any Material Respect.**

Respondent frankly concedes that in a number of respects the Georgia statute governing court-authorized wiretaps does not track the provisions of Title III, Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351, 82 Stat. 211-225, Chapter 119 of Title 18, United States Code (hereinafter referred to as "Title III" for brevity). However, there is a logical reason why it does not. The General Assembly of Georgia enacted, effective April 19, 1967 an Act entitled "Eavesdropping, Peeping Tom and Invasion of Privacy." See Georgia Laws 1967, pp. 844-852. The Act struck in its entirety former Georgia Code Chapter 26-20 and inserted Sections 26-2001 through 2011 in lieu thereof. In general, the Act made it a felony, among other prohibited eavesdropping acts, to intercept the contents of a message sent by telephone, telegraph, letter or other means of private communication. However, Section 26-2005 contained an exception as to law enforcement officers acting pursuant to court order in the investigation of certain enumerated crimes. Former Section 26-2005(c).

It should be noted that this statute was enacted *prior*

to the enactment of Title III, which became effective more than a year later on June 19, 1968. Therefore, there was no effective way in which the Georgia General Assembly could conform its wiretapping exception for law enforcement officers to a proposed Federal statute not yet enacted or approved in final form.

The next year, on April 10, 1968, the Georgia General Assembly enacted an entirely new, revised and updated Criminal Code of Georgia, to become effective on July 1, 1969. Georgia Laws 1968, pp. 1249, 1328. As a part of this new Code, Section 26-2005, relating to court-authorized wiretapping, was reenacted verbatim as Section 26-3004. This re-codification also occurred prior to the effective date of Title III. This Section is the one under attack as being unconstitutional in the instant petition.

Certain minor amendments not pertinent to the issues here were enacted in 1972. Georgia Laws 1972, pp. 615, 952-953.

Generally, the Georgia statute's lack of conformity to certain parts of Title III consists of *omissions* of certain Federal requirements. For example, the Georgia statute does not require the interception order to contain the minimization directions required by 18 U.S.C. 2518(5). However, no portions of *Ga. Code Ann.* § 26-3004 are constitutionally *repugnant* to Title III.

The failure of the Georgia statute to closely conform to certain portions of Title III does not render it unconstitutional, however, because of the decisions of the Georgia Appellate Courts which apply the requirements of Title III to State wiretap investigations, applications and court orders. Furthermore, a person such as this

Petitioner whose telephone is wiretapped by State officers pursuant to an order issued by a State Superior Court Judge wherein all requirements of Title III are complied with has no standing to contest the alleged inadequacies of the Georgia statute.

(b) **Georgia Appellate Courts have Uniformly applied the Standards of Title III to Wiretap Investigations by State Officers under the State Statute.**

In the first appeal arising from a court-authorized wiretap conducted under State law to reach the Supreme Court of Georgia, the order authorizing the wiretap and the renewal order failed to include the Federal provisions that they be executed as soon as practicable; failed to state whether interceptions should terminate when the described communication was first obtained; failed to direct that the interception be conducted in such a way as to minimize the interception of communications not otherwise subject to interception and failed to direct that the interception must terminate upon attainment of the authorized objective. There are requirements of 18 U.S.C. 2518 (4)(e) and (5) but are not required by *Ga. Code Ann.* § 26-3004. The Supreme Court of Georgia said in that case, *Cross v. State*, 225 Ga. 760, 171 S.E.2d 507 (1969), that the failure of the order to include the foregoing directions "requires a reversal of the verdicts of guilty and judgments of convictions because of the failure of the court to exclude evidence thus illegally obtained in violation of those provisions of the Federal Act."

In the *Cross* decision, supra, the Georgia Supreme Court declined to rule upon the constitutionality of the Georgia statute because of its rule of abstaining from passing upon the constitutionality of an Act of

the General Assembly where there is any other proper basis upon which to render a valid judgment. See *Lively v. Grinstead*, 210 Ga. 361, 80 S.E.2d 316 (1954). The Court added in *Cross*, supra, ". . . because if Chapter 119 was not complied with a reversal of the conviction is required irrespective of that question (the constitutionality of the Georgia statute)" (225 Ga. at 765. Explanatory words inserted).

This unanimous, full bench 1969 decision of the Georgia Supreme Court, which has not been modified, overruled or distinguished to date, shows conclusively that the highest court of the State of Georgia recognizes the controlling authority of Title III and will reverse State Court convictions arising from wiretaps not obtained in full compliance with that Federal statute, even though *Ga. Code Ann.* § 26-3004 may not have exactly the same requirements.

More recent decisions of the Georgia Supreme Court also recognize the controlling effect of Title III in State-conducted wiretaps. In *Granese v. State*, 232 Ga. 193, 196, 206 S.E.2d 26 (1974), that Court said ". . . Our Georgia statute is supplementary of the Federal statute." In *Orkin v. State*, 236 Ga. 176, 179, ____S.E.2d____ (1976), the Georgia Supreme Court reiterated that the requirements of both Federal and State law regarding wiretapping must be satisfied where applicable.

It should be noted in passing that the Supreme Court of Georgia, in *Granese v. State*, supra, upheld the constitutionality of *Ga. Code Ann.* § 26-3004 against contentions that it abridged constitutional freedom of speech, authorized unreasonable searches without probable cause, violated the right to counsel and privilege against self-incrimination, and denied due process of law.

(c) **All of the Mandatory Requirements of Title III were complied with in this Case.**

Counsel for Respondent will briefly document those material requirements of Title III not required by the Georgia wiretap statute which were complied with in the instant case. We will do so by references to either (1) the opinion of the Georgia Supreme Court affirming Petitioner's conviction, being *Lawson et al. v. State*, 236 Ga. 770, ____S.E.2d____ (1976) and reproduced in the Petition at pages 48-52; (2) the probable cause affidavit, Petition, pages 17-34; (3) the court order, Petition, pages 35-38; or (4) appropriate pages of the trial transcript (Tr.).

The following requirements of Title III were complied with in the instant case, though not required by the Georgia statute.

1. **Minimization.** Interceptions terminated on number of nonrelevant conversations. Interceptions terminated after two days though authorized for 20. *Lawson*, supra, Div. 2, Pet. p. 50; Court order requires minimization, Pet. p. 38.

2. **Other investigative methods tried and failed.** Affidavit, Pet. p. 28-29; *Lawson*, supra, Div. 1, Pet. 48-49.

3. **Inventory to those intercepted.** Actual notice given five days after termination of wiretap through service of search warrants and affidavits detailing wiretapped conversations. Tr. 354-359; State's Exhs. 15, 16.

4. **Statement in application of all known prior applications for wiretap orders for same persons or places.** Court notified of two prior wiretaps, one in application (see Pet. p. 32), and another by investigating officer (Tr. 71). See *Lawson*, supra, Div. 4, Pet. p. 51-52.

5. **Interceptions to commence as soon as practicable.** Interception order directs surveillance to begin at 12:01 p.m., September 24, 1974 (the day after Court signed order). Interception order, Pet. p. 36.

6. **Duration of interceptions.** Court order authorizes interceptions for 20 days, (or) until all relevant conversations are seized. Court Order, Pet. 37.

The one provision of Title III not duplicated in the Georgia statute which was not complied with in this case was the *discretionary* authority of the Court to require progress reports, authorized by 18 U.S.C. 2518(6). However, a Federal Judge may dispense with progress reports entirely. *United States v. Iannelli*, 3 Cir. 1973, 477 F.2d 999, affirmed 95 S.Ct. 1284; *United States v. Falcone*, D.N.J. 1973, 364 F.Supp. 877, affirmed 500 F.2d 1401. In this case, even had the Superior Court Judge required progress reports, the voluntary termination of interceptions after two days would no doubt have preceded the first reporting date.

In summary, this Petitioner's telephones were wiretapped precisely as they would have been if it had been a Federal investigation under authority of an interception order signed by a United States District Judge. Petitioner was deprived of none of the statutory or constitutional safeguards of Title III. Therefore, whether *Ga. Code Ann.* § 26-3004 contains all of those provisions is immaterial in a constitutional sense.

II. THIS PETITIONER HAS NO LEGAL STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE GEORGIA WIRETAP STATUTE BECAUSE IT WAS CONSTITUTIONALLY APPLIED AS TO HIM AND HE HAS SUFFERED NO HARM THEREFROM.

Having demonstrated heretofore that all substantial requirements of Title III were complied with in this case, notwithstanding the absence in the Georgia statute of some of those requirements, Respondent respectfully insists that the Georgia statute was applied constitutionally as to this Petitioner. He therefore does not have legal standing to attack those alleged deficiencies in *Ga. Code Ann.* § 26-3004 because he was not harmed in the slightest manner thereby. The Supreme Court of Georgia has so ruled in this case.

In *Lord v. State*, 235 Ga. 342, 219 S.E.2d 475 (1975), the Georgia Supreme Court held that where a party attacks a statute as being unconstitutional, he must show that the alleged unconstitutional feature of the statute injures him, and so operates as to deprive him of rights protected by the United States or Georgia Constitution or both.

This Honorable Court has firmly established and adhered to a similar rule in the landmark case of *United States v. Raines*, 362 U.S. 17, 4 L.Ed.2d 524, 80 S.Ct. 519 (1960), in which Mr. Justice Brennan said, speaking for the Court without a dissent, in pertinent part:

> "Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its ap-

plication might be unconstitutional." (Citations omitted).

Thus, since any alleged deficiencies in the Georgia wiretapping statute were not applied harmfully to Petitioner because of the strict adherence to the requirements of Title III, he completely lacks legal standing to attack the constitutionality of *Ga. Code Ann.* § 26-3004.

CONCLUSION

The wiretap of Petitioner's telephones having been authorized and conducted in full compliance with Title III, he lacks legal standing to challenge the constitutionality of the Georgia statute providing for court-authorized wiretaps on the grounds that it fails to embody certain requirements of Title III. Even if he should have standing, the statute is constitutional because of its construction by the Supreme Court of Georgia as supplementary of Title III.

Respondent therefore respectfully urges this Honorable Court to overrule and deny the Petition for Writ of Certiorari to the Supreme Court of Georgia in the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States in good standing, and that I have on this date deposited in the United States Post Office, Atlanta, Georgia, three copies of the foregoing Brief of the State of Georgia in Opposition to Petition for Writ of Certiorari to the Supreme Court of Georgia with first class prepaid postage addressed to Frank B. Hester, Esq., Attorney at Law, 215 Ten Pryor Street Building, Atlanta, Georgia 30303, the counsel of record for Petitioner Bobby Joe Upton.

This 29th day of July, 1976.

/s/RICHARD L. CHAMBERS

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